IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff	:	
v.	:	CP-22-CR-0003388-2013
ROBERT J. MELLOW,	:	
Defendant	:	

MOTION TO QUASH STATE COURT SUBPOENA

AND NOW, COMES the United States of America, on behalf of United States Attorney, Peter J. Smith, and Criminal Chief, Christian A Fisanick, by and through the undersigned counsel, and respectfully moves this Court to quash the subpoenas delivered to Mr. Smith and Mr. Fisanick calling for their testimony at a hearing on August 18, 2014, in the above-captioned matter. A memorandum in support of this motion is being filed contemporaneously.

Respectfully submitted,

PETER J. SMITH
UNITED STATES ATTORNEY

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Dated: August 13, 2014

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff	:	
v.	:	CP-22-CR-0003388-2013
ROBERT J. MELLOW,	:	
Defendant	:	

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania, and is a person of such age and discretion as to be competent to serve papers.

That on August 13, 2014, she served copies of the attached:

BRIEF IN SUPPORT OF MOTION TO QUASH STATE COURT SUBPOENA

by placing said copy in a postpaid envelope addressed to the persons hereinafter named, at the places and addresses stated below, which is the last known addresses, and by depositing said envelopes and contents in the United States Mail at Scranton, Pennsylvania.

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IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff	:	
v.	:	CP-22-CR-0003388-2013
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BRIEF IN SUPPORT OF MOTION TO QUASH STATE COURT SUBPOENA

ARGUMENT

I. **The United States is Immune from State Court Subpoena under the Doctrine of Sovereign Immunitv and Separation of Powers**

It is well established that an action seeking specific relief against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to a governmental privilege of immunity. Boron Oil Co. v. Downie, 873 F.2d 67, 69 (4th Cir. 1989) (quoting Larson v. Domestic & Foreign Commerce, 337 U.S. 682, 688 (1949)). It is also well settled that sovereign immunity bars enforcement of a state court subpoena

issued to a federal employee or agency. United States v. Williams, 170 F.3d 431, 433-34 (4th Cir. 1999); In re Elko County Grand Jury v. Siminoe, 109 F.3d 554, 556 (9th Cir. 1997); Edwards v. U.S. Dep't of Justice, 43 F.3d 312, 317 (7th Cir. 1994), see also, Realty Com v. H Kohnstamm & Co., No. 08-5582,2009 WL 2982632 (D.N.J. Sept. 10,2009) (United States has standing to challenge subpoenas issued to former employees and principles of sovereign immunity apply).

Non-party subpoena proceedings are subject to sovereign immunity, unless that immunity has been waived. I t is well settled that only Congress has the power to waive the sovereign immunity of the United States. State of Minnesota v. United States, 305 U.S. 382, 387(1939). No act of Congress has effected a general waiver of sovereign immunity with respect to subpoena action in state court. Accordingly, state courts lack authority to compel federal agencies and employees to provide testimony or produce government records or evidence, and the subpoena against the United States must be quashed under the doctrine of sovereign immunity.

Moreover, the subpoena impacts upon the federal government and interferes with the public administration. See, Boron Oil Co., 873 F.2d at 70-71. The administration of the federal government cannot be obstructed whenever a state court litigant desires information. See, Reynolds Metals Co. v. Crowther, 572 F. Supp 288, 290-91 (D. Mass 1982); Envtl. Enter.. Inc. v. U.S. E.P.A., 664 F. Supp. 585,586 (D. D.C. 1987).

Similarly, the Supremacy Clause of the United States Constitution would also bar a state court from ordering production of documents from a federal officer, if such production would violate the duty the officer owes in the performance of his or her job. See, Bosaw v. Nat'l Treasury Employees' Union, 887 F.Supp. 1199, 1217 (S.D.Ind.1995); cf. United States v. Kaufman, 980 F. Supp. 1247, 1251 (S.D. Fla. 1997) (subpoena issued by state court judge against federal judge on behalf of state bar investigative committee violated Supremacy Clause of the United States Constitution); Maddox v. Williams, 855 F.Supp. 406,413-14 (D.D.C.1994) aff'd sub nom,

Brown & Williamson Tobacco Corn. v. Williams, 62 F.3d 408 (D.C. Cir. 1995) (basing rejection of argument that a Kentucky state court could require members of a United States Congressional committee to furnish documents in their possession to a party to a civil state law suit in Kentucky state court on the Supremacy Clause of the United States Constitution.) See also, In re Order to Show Cause, No. 07-60178CIV, 2007 WL 2077632, at *2 (S.D. Fla., 2007) (reluctance to allow a state court to order federal officers to act, when such action would violate instruction from their department heads, stems from a blend of sovereign immunity, Supremacy Clause, and federalism concerns).

Accordingly, due to well-established principles of sovereign immunity and the Supremacy Clause of the United States Constitution, the subpoenas directed to United States Attorney Peter J. Smith and Criminal Chief Christian A. Fisanick must be quashed.

II. The Department of Justice and United States Attorney's Office for the Middle District of Pennsylvania has not authorized Peter J. Smith, United States Attorney for the Middle District of Pennsylvania, and/or Christian A. Fisanick, Criminal Chief, to provide oral testimony at the August 18, 2014 hearing in Commonwealth of Pennsylvania v. Robert J. Mellow (No. CP –CR – 0003388 – 2013) and, as a result, the subpoenas issued to them must be quashed.

The authority of a federal agency to promulgate regulations reserving to it the authority to determine when and to what extent agency documents, records or information may be disclosed by its employees has been upheld by the U.S. Supreme Court in United States ex rei. Touhy v. Ragen, 340 U.S. 462 (1951) and subsequent federal court decisions. In Touhy, the Supreme Court held that a subordinate of the Department of Justice could not be held in contempt for refusing to comply with the subpoena duces tecum consistent with the prohibition set forth in validly issued Justice Department regulations. Touhy, 340 U.S. at 469. See also, Swett v. Schenk, 792 F.2d 1447, 1451 (9th Cir. 1986).

Pursuant to its authority under 28 U.S.C. § 16.21 et seq, the United States Department of Justice has promulgated Touhy

regulations governing "the production or disclosure of any material contained in the files of the Department...or any information acquired by any person while such person was an employee of the Department as part of the performance of that persons official duties or because of that persons status." 28 U.S.C. §16.21(a). (Attached hereto as Exhibit A). Therefore, the testimony and records sought from United States Attorney Peter J. Smith and Criminal Chief Christian A. Fisanick fall within the regulations' purview since said testimony concerns information acquired in the performance of their official federal duties. The purpose of these regulations is, among other things, to protect confidential and sensitive information and the deliberative processes of the federal government. In furthering those aims, the regulations require that a person seeking testimony or records from Department of Justice personnel submit a detailed written request to the Department seeking prior authorization for testimony and/or the production of Department records. Id. at §§16.22(c) and (d). Thus, these regulations prohibit Department personnel from providing testimony in legal proceedings except as authorized in accordance with

the regulations. Id. at §16.22(a). Further, "Whenever a demand is made on an employee...the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located"...and "the responsible United States Attorney shall follow the procedures set forth in §16.24 of this part." 28 U.S.C. §16.22(b). The "originating component," here the U.S. Attorney's Office for the Middle District of Pennsylvania, "shall decide whether disclosure is appropriate." 28 U.S.C. §16.24(d)(2).

In the instant matter, on July 25, 2014, Attorney Daniel T. Brier, sent subpoenas via certified mail to United States Attorney, Peter J. Smith, Criminal Chief, Christian A. Fisanick, and Assistant United States Attorney Francis P. Sempa, to attend and testify at an August 18, 2014 hearing in the matter Commonwealth of Pennsylvania v. Robert J. Mellow (No. CP –CR – 0003388 – 2013). The subpoena was issued through the Dauphin County Court of Common Pleas. (Attached hereto as Exhibit B). On August 1, 2014, AUSA, G. Michael Thiel, sent a letter to Attorney Brier indicating that the disclosure/dissemination of the information obtained by Peter J. Smith, Christian A. Fisanick and

Francis P. Sempa during and in the course of their employment is controlled by statute and regulation, and in order to determine whether or not the request will be granted, the requester, Attorney Brier, pursuant to regulation, must provide the U.S. Attorney's Office with a summary of the information sought and its relevance to the proceeding. (Attached hereto as Exhibit C). On August 11, 2014, Attorney Brier responded to the August 1, 2014, letter from the U.S. Attorney's Office, indicating, among other things, the reasons why he believed the information and testimony sought was relevant to the matter of Commonwealth of Pennsylvania v. Robert J. Mellow. (Attached hereto as Exhibit D).

The government does not dispute the fact that AUSA Sempa met with Deputy Attorney General Brandstetter and/or provided her with FBI 302 reports of interviews and IRS reports of interviews. (See Sempa Statement attached hereto as Exhibit E which was provided to Attorney Brier on August 1, 2014). In fact, the government is prepared to allow AUSA Sempa to testify at the hearing on August 18, 2014, to a limited extent, namely, to the facts and circumstances surrounding the

scheduling of the meeting with Trooper Hannon and DAG Brandstetter, the sequence of events that resulted in him providing information to DAG Brandstetter, and what was discussed at the meeting.[1]

The testimony of the U.S. Attorney and the Criminal Chief is completely irrelevant to the matter before the court.

It is clear from the supplemental statement summarizing the testimony sought from the U.S. Attorney and the Criminal Chief (See Attachment D at 6-10), that their testimony is sought solely because they are AUSA Sempa's supervisors. Apparently, Attorney Brier believes that AUSA Sempa needed their approval to share the FBI 302's and IRS reports of interviews with the Attorney General's Office because they somehow represent grand jury materials/information. Attorney Brier believes that AUSA Sempa's failure to get their approval prior to sharing the information with the DAG somehow constitutes prosecutorial misconduct.[2] This belief is mistaken, unfounded and

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[1] These are the only areas of inquiry upon which AUSA Sempa has been authorized to provide testimony. As such, not only will he be instructed not to answer all other questions, he is legally prohibited from doing so. 28 U.S.C §16.22(a).

[2] Likewise, Attorney Brier filed an "Expedited Motion for Disclosure of Grand Jury Motions and Orders" in Federal District Court

lacks legal authority. See In Re Grand Jury Matter Appeal of Nicholas Catania, 682 F.2d 61 (3d Cir. 1982)(FBI 302s and prosecution memo summarizing FBI investigation are not matters occurring before the grand jury, even if developed with an eye toward ultimate use in a grand jury); In re Grand Jury Investigation Appeal of New Jersey State Commission of Investigation, 630 F.2d 996 (3d Cir. 1980) (Rule 6(e) shields only those matters occurring before the grand jury. It is designed to protect from disclosure only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process).

The mere fact that a particular document is reviewed by a grand jury does not convert it into a matter occurring before the grand jury. Id. See United States v. Chang, 47 Fed. Appx. 119 (3d Cir. 2002) (Information does not become a matter before the grand jury simply by

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for the Middle District of Pennsylvania on August 7, 2014, because he believes that the information shared with the DAG, the FBI 302's and IRS reports of interviews, represented grand jury material that required a court order allowing it to be shared with the Office of Attorney General. (See Exhibit F attached hereto).

being presented to the grand jury, particularly where it was developed independently of the grand jury).

Information developed outside the grand jury process although perhaps developed with an eye toward use in a grand jury proceeding exists apart from the grand jury process Id. Citing Catania (3d Cir.)); Anaya v. United States, 815 F.2d 1373 (10th Cir. 1987) (Disclosure of memorandum of interview of witness outside of the grand jury room does not violate Rule 6(e) secrecy rule. Such reports are not summaries of grand jury testimony and therefore did not disclose matters that occurred before the grand jury); Blalock v. United States, 844 F.2d 1546 (11th Cir. 1988) (Rule 6(e) only protects information revealing what has occurred or will occur inside the grand jury room).

The Rule does not protect from disclosure information obtained from a source other than the grand jury, even if the same information is later presented to the grand jury. Id. Federal agents did not violate Rule 6(e) when they allowed state investigators to be present during questioning of a potential grand jury witness. Id. See United States v. Stanford, 589 F.2d 285 (7th Cir. 1978) (Rule 6(e) only applies to

disclosures of matters occurring before the grand jury. Agents did not violate grand jury secrecy rules by disclosing documents subpoenaed by the grand jury to witnesses during interviews of those witnesses outside the grand jury. The documents, even though subpoenaed by the grand jury, were not matters occurring before the grand jury); United States v. Dynavac, 6 F.3d 1407 (9th Cir. 1993) (Rule 6(e) is intended only to protect against disclosure of what is said or takes place in the grand jury room).

It is not the purpose of the Rule to foreclose from future revelation to proper authorities the same information or documents which were presented to the grand jury. Id. If a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release. Id. Citing Dileo v. Commissioner, 959 F.2d 16 (2d Cir. 1992)); In re Grand Jury Matter, 2009 WL 249796 (W.D. Pa. 2009) (Where documents are created for purposes independent of grand jury investigations and have legitimate uses unrelated to the substance of grand jury proceedings, their mere review

by a grand jury does not convert them to grand jury matters within the meaning of Rule 6(e). (Citing the two 3d Cir. cases above). Business records relating to transactions that were the subject of a grand jury investigation and that were reviewed by the grand jury were not matters that occurred before the grand jury); United States v. DiBona, 601 F.Supp. 1162 (E.D.Pa.1984) (Solely because evidence was presented to a grand jury does not render it grand jury material shrouded in the cloak of secrecy. Citing the Third Circuit's decision in Catania, the court explained that disclosure of information (FBI 302s) obtained from a source independent of the grand jury proceeding, although done so with the purpose of ultimately using it before the grand jury, is not grand jury material and falls outside the scope of rule 6(e). FBI 302s prepared while the grand jury was still in progress and which included materials derived from information received by the grand jury were not matters that occurred before the grand jury); United States v. Renzi, 2011 WL 7628538 (D. Ariz. 2011) (A disclosure of matters occurring before a grand jury must reveal some secret aspect of the inner workings of the grand jury).

Rule 6(e) protects the essence of what takes place in the grand jury room. Rule 6(e) does not extend to the disclosure of information obtained from a source independent of the grand jury. Id. Citing the 9th Circuit case of Davies v. C.I.R., 68 F.3d 1129 (9th Cir. 1995), the court noted that even evidence closely related to a grand jury investigation is not matters that occurred before the grand jury when it is no part of what transpired in the grand jury room). In re Grand Jury Proceedings, 503 F.Supp. 800 (E.D. Va. 2007) (FBI 302s produced after a proffer session with a witness who appeared for an interview after having been subpoenaed by the grand jury, do not fall within Rule 6(e) protection. The 302s do not reveal what testimony and documents were presented to the grand jury. They simply recount what the witness remembered about certain incidents).

When documents or other material will not reveal what actually has transpired before a grand jury, their disclosure is not an invasion of the protective secrecy of its proceedings, and it is not the information itself, but the fact that the grand jury was considering that information which is protected by Rule 6(e). Id. Citing Anaya v. United States and

Catania (3d Cir.))(United States v. Rosen, 471 F.Supp. 651 (E.D. Va. 2007) : Rule 6(e) protects only the essence of what takes place in the grand jury room. A disclosure of matters before the grand jury must reveal some secret aspect of the inner workings of the grand jury. Disclosure of the details of a government investigation that is independent of a parallel grand jury investigation does not violate Rule 6(e)); In re Grand Jury Proceedings, 505 F.Supp. 978 (D. Maine 1981) (Disclosure of FBI reports of interviews which included references to documents produced as a result of grand jury subpoenas not governed by Rule 6(e). Those reports are not matters that occurred before the grand jury).

In light of the legal authority set forth above, AUSA Sempa did not need the U.S Attorney and/or the Criminal Chief to approve his decision to share the information with the Office of Attorney General (See Fisanick Affidavit attached hereto as Exhibit G), regardless of whether or not, they did in fact, approve it. Likewise, any argument that a court order was necessary lacks merit. Thus, the information sought from the U.S. Attorney and the Criminal Chief is completely

irrelevant to the case before this court, and, as a result, the subpoenas should be quashed.[3]

More importantly, because their testimony has not been authorized by the Department of Justice, the United States Attorney Peter J. Smith, and Criminal Chief Christian A. Fisanick, are legally prohibited from complying with the subject subpoenas and, consequently, the subpoenas should be quashed. 28 U.S.C. §16.22(a).

[3] As set forth above, the United States Attorney's Office takes the position that none of the information provided by AUSA Sempa was grand jury material governed by Rule 6(e). With that said, Attorney Brier is still free to make those legal arguments, as unfounded as they may be, to the court in defense of his client. Factually, there is nothing further that any of these witnesses can provide that will change the fact that they didn't consider the information to be grand jury material. The only thing left is for the court to rule on Attorney Brier's argument.

CONCLUSION

In light of the foregoing, this Court should grant the instant motion and quash the subpoenas served on the United States Attorney Peter J. Smith and Criminal Chief Christian A. Fisanick.

Respectfully submitted,

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Dated: August 13, 2014

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